82-1383

No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

WILLIAM J. CINTOLO,
PETITIONER,

v.

UNITED STATES OF AMERICA AND
THE HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

DAVID BERMAN,
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Questions Presented

1. Is an order disqualifying an attorney from representing witnesses before a Grand Jury appealable under Title 28 U.S.C. §1291, or §1292(a), or under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)?

2. If an order disqualifying an attorney from representing witnesses before a Grand Jury is not appealable, is it nevertheless subject to challenge in a petition for extraordinary relief under Title 28 U.S.C. §1651 generally or, especially where as here, the District Court acted on a premature motion that had already been denied by another Judge of the same Court and failed to hold even the semblance of a hearing before allowing the motion?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

WILLIAM J. CINTOLO,
Petitioner,

V.

UNITED STATES OF AMERICA
HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS
Respondents,

Citations to Opinions Below

There are no reported opinions below. The brief *per curiam* opinions of the Court of Appeals dismissing Petitioner's appeal and denying his petition under Title 28 U.S.C. §1651 are duplicated as appendices to this petition.

Jurisdiction

On January 26, 1983, the United States Court of Appeals entered judgments dismissing Petitioner's appeal from an order

of the United States District Court for the District of Massachusetts (Caffrey, C.J.) entered on January 19, 1983 disqualifying Petitioner, an attorney, from representing witnesses before a grand jury in a particular investigation on the ground that such an order is not appealable and denying Petitioner relief in a petition under Rule 8(a) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. §1651 filed on January 24, 1983. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

Questions Presented

1. Is an order disqualifying an attorney from representing witnesses before a Grand Jury appealable under Title 28 U.S.C. §1291, or §1292(a), or under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan*

Corp., 337 U.S. 541, 546 (1949)?

2. If an order disqualifying an attorney from representing witnesses before a Grand Jury is not appealable, is it nevertheless subject to challenge in a petition for extraordinary relief under Title 28 U.S.C. §1651 generally or, especially where as here, the District Court acted on a premature motion that had already been denied by another Judge of the same Court and failed to hold even the semblance of a hearing before allowing the motion?

Statutory Provisions

Title 28 U.S.C. §1291 states:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands,

except where a direct review may be had in the Supreme Court.

Title 28 U.S.C. §1292(a)(1) states:

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Island, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Title 28 U.S.C. §1651(a) states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 17.1(a) of the Rules of this Court state:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The Fifth Amendment of the Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8(d) of the Rules of the United States District Court for the District of Massachusetts states:

> (d) *Assignment.* The Clerk shall assign cases to the judges of the court by lot in such manner that each judge shall be assigned as nearly as possible the same number of cases in each category.

Rule 9(a) of the Rules of the United States District Court for the District of Massachusetts states:

> 9(a) *Matters and proceedings heard by emergency judge.* There will be designated an emergency judge to hear and determine:
>
> (1) matters requiring immediate action in cases already assigned to any judge of the court, if the judge to whom a case has been assigned is unavailable or otherwise unable to hear the matter.
>
> (2) special proceedings the nature of which precludes their assignment in the ordinary course;
>
> (3) any other proceeding, including an admission to the bar

and a naturalization, which is not part of or related to a case that should be assigned in the ordinary course.

Statement of the Case

The United States District Court for the District of Massachusetts, Caffrey, C.J., received two motions from the Government on January 18, 1983. One was a motion to make an in camera submission to the Court pertaining to Petitioner William J. Cintolo. This motion was allowed by Judge Caffrey when it was received and without any notice at all to Petitioner. The second motion was to disqualify Petitioner, an attorney duly admitted to practice before the United States District Court for the District of Massachusetts, from representing witnesses before a Grand Jury carrying on a particular investigation, especially witnesses named Orlandella

and Daw. Having informed Petitioner through his Clerk that he would hold a hearing at 4:00 p.m., on January 19, 1983 on the motion to disqualify (the Clerk reached Petitioner by telephone late in the afternoon on the 18th), Judge Caffrey began the hearing by announcing that he had read the Government's *in camera* submission and on the basis of it was allowing the motion to disqualify. At this point he had not heard any opposition to the motion and, predictably, when he heard opposition based on (*inter alia*) the fact that another Judge of the District Court had denied an identical motion by the Government[1/], the prematurity of the Government's motion since no witness whom Petitioner

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1/ This allegation is set forth in an affidavit filed by Petitioner in the District Court.

had proposed to represent had yet testified before the Grand Jury, the inappropriateness of *ex parte* communications to a Judge, especially prior to notice and in the absence of an emergency, and the failure to assign this case in accordance with the Local Rules[2/], he adhered to his decision.

The following day, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the First Circuit and a motion for stay pending appeal. The latter was denied. On January 24, 1983, the appeal having been entered in the Court of Appeals, Petitioner also filed in that Court a petition for writ of mandamus,

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2/ The Local Rules require the assignment of all cases, with certain exceptions of which motions to disqualify are *not* an example, by lot, but the Government's motion was assigned to Judge Caffrey as Emergency Judge.

and writ of prohibition and other relief under Title 28 U.S.C. §1651. Without hearing, the Court of Appeals on January 26, 1983, with only the briefest of opinions, dismissed the appeal and denied relief under §1651.

Because of the *ex parte* nature of virtually all of the Government's submissions to the District Court, there is no factual record to which Petitioner can refer. It may be inferred, however, (a) that the Government believes Petitioner to be a target of an investigation currently undertaken by a Grand Jury, (b) that Orlandella and Daw, the witnesses who are specifically mentioned in the Government's motion and whom Petitioner indeed intended to represent in their appearance before the Grand Jury, were being called to testify

in connection with this investigation, and (c) that the Government regards Petitioner's representation of Orlandella and Daw and any other Grand Jury witness called in connection with this investigation as a conflict of interest.

Reasons for Granting the Writ

I. WITH RESPECT TO WHETHER DECISIONS DISQUALIFYING ATTORNEYS ARE APPEALABLE, THERE IS A CONFLICT AMONG THE CIRCUITS, AND THE FIRST CIRCUIT'S RULE OF "NON-APPEALABILITY" IS NOT IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND IS WRONG.

Rule 17.1(a) of the Rules of this Court indicates that a conflict of the decision rendered by a court of appeals with decisions rendered by other Courts of Appeals is an important consideration governing the exercise of the certiorari jurisdiction. There is in plain and simple

English a conflict among the circuits on whether orders disqualifying attorneys from representing witnesses are appealable. Cases holding that they are immediately appealable include *Matter of Grand Jury Empaneled January 21, 1975*, 537 F.2d 1009, 1011 (3rd Cir. 1976); *In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600, 605, fn. 8 (D.C. Cir. 1976); *United States v. Curcio*, 694 F.2d 14, 19-20 (2nd Cir. 1982); *In Re Lynchburg Grand Jury*, 563 F.2d 562, 655 (4th Cir. 1977); *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 528 (5th Cir.). The First and Ninth Circuits take the opposite view. *In Re Benjamin*, 582 F.2d 121, 123, 125 (1st Cir. 1978). *United States v. Greger*, 657 F.2d 1109, 1111-1115 (9th Cir. 1981). Regardless of which view is right, the time has plainly come for this Court to take upon

itself the duty of umpiring the Federal system and settling the rule on appealability of orders disqualifying attorneys one way or the other.

This, of course, would be true even if the view taken by the First Circuit were right. But it is not right. Plaintiff has a right of appeal under either of two statutes, or, if not, under the collateral order doctrine enunciated in such cases as *Perlman v. United States*, 247 U.S. 7, 13 (1918) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

We consider first whether the order was appealable as a "final decision" under Title 28 U.S.C. §1291. Although the entry and service in the case are somewhat informal, to say the least, this is basically a civil action, unreleated to any indictment to any pending case, in which

the Government sought and obtained specific relief on the bases of specific representations. Even if Orlandella and Daw never testify before any Grand Jury, even if no indictments are ever returned, even if the Government should at some time in the future give up its investigation entirely, an order has been made in an adversary proceeding. Whatever other orders may or may not be final decisions within the purview of §1291, an order terminating an action is plainly final. See *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 170-171 (1974).

It may be argued, however, that a decision disqualifying an attorney is not "final" in that circuits like the First that do not permit direct appeal nevertheless permit review on the merits if a witness under subpoena is held in contempt for refusing to answer questions

and the refusal is based upon the invalidity of the order of disqualification. See *e.g., In Re Benjamin*, 562 F.2d. 121, 123 (1st Cir. 1978). It remains to be seen, however, whether the order of disqualification is an interlocutory order granting an injunction and thus appealable under the provisions of Title 28 U.S.C. §1292(a)(1). Once again we must note that Petitioner has been directed by the Court not to do that which he would otherwise have both a right and a duty to do, represent before the Grand Jury witnesses who have retained him for that purpose. To quote Black's Law Dictionary (De Luxe Fourth Ed.), page 923:

> INJUNCTION. A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some

> act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff and not such as can be adequately redressed by an action at law. Dupre v. Anderson, 45 La.Ann. 1134, 13 So. 743; City of Alma v. Loehr, 42 Kan. 368, 22 P.424. A judicial process operating in personam and requiring person to whom it is directed to do or refrain from doing a particular thing. Gainsburg v. Dodge, 193 Ark. 473, 101 S.W. 2d 178, 180.

If because of its potential for later review in a contempt proceeding, the order issued by Judge Caffrey was not "final," it was nevertheless an "injunction" within the purview of this language and, being interlocutory in character, immediately subject to review by the Court of Appeals.

Finally, even if the order of disqualification was neither an interlocutory injunction nor a final decision, Petitioner

submits that it came within the so-called collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). As this Court stated in *Eisen v. Carlisle & Jacquelin*, *supra*, 171-172:

> We find the instant case controlled by our decision in Cohen v. Beneficial Indus. Loan Corp., *supra*. There the Court considered the applicability in a federal diversity action of a forum state statute making the plaintiff in a stockholder's deprivative action liable for litigation expenses, if ultimately unsuccessful, and entitling the coproration to demand security in advance for their payment. The trial court ruled the statute inapplicable, and the corporation sought immediate appellate review over the stockholder's objection that the order appealed from was not final. This Court held the order appealable on two grounds. First, the District Court's finding was not "tentative, informal or incomplete." 337 U.S., at 546, 69 S.Ct., at 1225, but settled conclusively the corporation's claim that it was entitled by state law to

require the shareholder to post security for costs. Second, the decision did not constitute merely a "step toward final disposition of the merits of the case . . . ." *Ibid.* Rather, it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. The Court summarized its conclusion in this way:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

A motion to disqualify counsel in a criminal case implicates at least three interests: the interest of an attorney in pursuing his profession and in his reputation, see e.g., *Willner v. Committee on Character and Fitness*, 373 U.S. 96, the interest of the client in being represented

by counsel of his own choosing, *In Re Taylor*, 567 F.2d 1183, 1186, fn. 1 (1977 2nd Cir.), and the interest of the Government in avoiding conflicts of interest that may lead to motions to suppress or post-convictions proceedings. When the Government succeeds at the District Court level in having counsel disqualified, its interests are presumably fully vindicated. If the District Court acts erroneously[3/], however, how may the lawyer and the client[4/] vindicate their

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3/ The entirely *ex parte* nature of the District Court's action in the present case significantly increases the chances of error. *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968).

4/ In the present case the clients, Daw and Orlandella, received neither formal nor informal notice of the Government's motions, though they were persons entitled to notice, see *In Re Taylor*, *supra*, and their failure to receive it was specifically called to the District Court's attention.

respective interests if the order is non-appealable? The client, we are told, may do so by refusing to answer questions before the Grand Jury and, if he is cited from contempt, challenge the citation on the grounds that the order disqualifying his attorney was improperly made.

From virtually every viewpoint, this procedure smacks of foolishness. In the first place, it calls upon one District Court Judge to review a finding and ruling made by another District Court Judge or, perchance, by himself. Such review is likely to prove embarrassing or meaningless or both. From the client's viewpoint, there is the need to hire (and pay) counsel who will represent him in a new proceeding and to assume the risk of obloquy and imprisonment. To make matters worse, the client is forced to assume all

these risks merely to assert one of his basic Constitutional rights: the right to be represented by counsel of his own choosing. *Taylor, supra.*

From the lawyer's viewpoint, the procedure of review by contempt citation is even worse. In all likelihood the client in most cases will not take the risks involved but will simply get other counsel, making review forever impossible. Even if the client remains steadfast in his choice of counsel, in the face of virtually every known principle with respect to the law of standing, see *Laird v. Tatum*, 408 U.S. 1, 14, fn. 7 (1972), the lawyer will be looking to a third party to vindicate his rights. Since he is effectively without any but the most illusory means of vindicating his rights if the order of disqualification is unappealable, and since disqualification generally includes not

merely immediate harm to the lawyer's pocketbook but, much worse, long-range harm to the lawyer's reputation, the disqualification of the lawyer must be appealable. *Perlman v. United States*, *supra*. At the very least, the order with respect to the lawyer is so far final as to be appealable under the rule of *Eisen*, *supra*.

II. THE COURT OF APPEALS ERRONEOUSLY RULED THAT PETITIONER WAS NOT ENTITLED TO RELIEF UNDER TITLE 28 U.S.C. §1651.

In its brief order denying relief under Title 28 U.S.C. §1651 the Court of Appeals gave three reasons why Petitioners were not entitled to relief. These were (a) the absence of "patent abuse of discretion" (b) the absence of new or important issues regarding the power of the District Court, and (c) the absence of extraordinary circumstances.

To the extent that the decision rested

upon the absence of important issues of law, it is in conflict with the holding of the Second Circuit in *In Re Taylor*, *supra*, 1187, that the motion to disqualify counsel from representing witnesses before the grand jury was premature, and should have been dismissed. In *Taylor*, *supra*, 1185-1186, the Court was faced with facts indistinguishable from the facts in the present case except that in *Taylor* there was no allegation that the attorney was a target of the Grand Jury. But that distinction is without substance since it is as much a conflict for an attorney to represent witnesses with conflicting interests as it is for him to represent witnesses whose interests may conflict with his own.

Yet another important issue raised by the §1651 petition was whether Respondent Caffrey should have in effect overruled a decision made several weeks earlier

by another Judge of the United States District Court for the District of Massachusetts. Both on grounds of *res judicata*, see *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), and on the grounds that one Judge should not normally "overrule" a decision of another Judge in the same Court and in the same case, see *Donnelly Garment Co., v. National Labor Relations Board*, 123 F.2d 215, 220 (8th Cir. 1941), Judge Caffrey should have allowed Petitioner's motion to dismiss the Government's motion for disqualification.

A third important issue of law was whether this case should have been assigned by lot as Rule 8(d) of the Rules of the United States District Court for the District of Massachusetts seems to require and not merely assigned to Respondent Caffrey as emergency judge. We note that

motions of this type are not included under cases assignable to the emergency judge under Rule 9 of the Rules of the United States District Court.

But by far the most extraordinary aspect of this case is the manner in which it was handled by Respondent Caffrey in the District Court. Upon receiving a motion from the Government for leave to make an *in camera, i.e., ex parte,* submission, he allowed the motion even before Petitioner had even received notification that the motion had been filed. There are, of course, occasions on which an *ex parte* submission to a judge is appropriate; the classic example is an application for a temporary restraining order. See Rule 65(b) of the Federal Rules of Civil Procedure. But the power to issue restraining orders is hedged above by numerous safeguards including a

ten-day expiration date, Rule 65(b), and a judge issuing it knows that the Defendant will promptly receive a copy of all submissions made to him and have a full opportunity to rebut, explain and contradict whatever was said in the application. Even so, temporary restraining orders are disfavored in the Federal courts, and only a most substantial showing of urgency will justify the granting of such an order. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 451 U.S. 423, 438-439 (1974) ("The stringent restrictions imposed by §17 and now by Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted

both sides of a dispute").

In the instant case the Government made no showing in its motion for leave to make an *ex parte* submission of any emergency justifying such a submission. It did in the motion indicate that Petitioner was a target of an on-going grand jury investigation. But even if, as the motion did *not* say, the submission that the Government proposed to make was of evidence that had been or would be presented to the grand jury,[5/] that allegation, taken as true, would not require that the submission be *ex parte* either under Rule 6(e) of the Federal Rules of Civil Procedure or under common law. See, *e.g.*, *Silverior v. Municipal Court of Boston*, 355 Mass. 623, 627-628, 247 N.E.2d 379, (1969) cert. den. 396 U.S. 878.

Having allowed the Government's motion for leave to make an *ex parte* submission,

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5/ The motion for leave to file affidavit for *in camera* review stated that the affidavit contained the "substance of evidence ... presently before the grand jury."

Respondent Caffrey then allowed the Government's motion for disqualification. It was as simple as that. Since according to his lights Petitioner had no right to knowledge, or even an inkling, of what was in the submission and since what was in the submission convinced him that Petitioner should indeed be disqualified, why waste time on listening to any issues of fact or law that Petitioner might wish to raise? He opened the so-called "hearing" by announcing that he was allowing the Government's motion, and thus there was in reality no hearing at all. *Cf. Morgan v. United States*, 304 U.S. 1, 18 (1938); *Interstate Commerce Commn. v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913); *Billington v. Underwood*, 613 F.2d 91, 95, (5th Cir. 1980). Petitioner came to court to hear the verdict read and the sentence pronounced, without benefit of trial, hear-

ing, or even notice of the charges.

It should hardly be necessary to point out that notice and the opportunity for hearing lie at the heart of the Due Process Clause of the Fifth Amendment. To quote *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections*. Milliken v. Meyer, 311 U.S. 457; Grannis v. Orleans, 234 U.S. 385, Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information. (Emphasis supplied.)

The right to be heard prior to disqualification has been applied to the right to practice law. *Willner v. Committee on*

Character & Fitness, 373 U.S. 96, 102, 103-105 (1963) as it has been applied to the right to practice other professions and occupations. See, e.g., *Connell v. Higginbotham*, 403 U.S. 207, 208-209 (1971) and cases cited.

Particularly applicable here is *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1928) stating that not merely the general right to practice a profession but the right to practice a specific aspect of it may not be cut off without the opportunity for a hearing.

The manner in which Respondent Caffrey reached his decision dovetailed rather neatly with his denial of Petitioner's motion for a continuance, a motion that Petitioner did not even have the opportunity to make until the decision was announced: e.g., if the motion was to be allowed *ex parte*,

why give Petitioner time for preparation? But Petitioner was entitled to be heard, and twenty-four (24) hours was insufficient time. See *Granny Goose Foods, Inc., v. Brotherhood of Teamsters, supra*, 432, fn. 7 (same day notice on hearing of preliminary injunction did not suffice).

If the manner in which Respondent Caffrey conducted himself on the Government's motion to disqualify Petitioner was not a "patent abuse of discretion" justifying intervention by the Court of Appeals through a writ of mandamus, under what circumstances could it be said that discretion was patently abused. In what conduct after all could a judge engage in respect of a motion by the Government to disqualify an attorney that would be more outrageous than that of Respondent Caffrey in the present instance? Perhaps the answer to the Court of Appeals

is that it is sufficient grounds for the issuance of a writ of mandamus that the District Court abused its discretion, *i.e.*, usurped its power, *Will v. United States*, 389 U.S. 90, 95 (1967), and that whether, as Petitioner believes, it did so patently, is a less than important issue.

In seeking certiorari to review the order dismissing the petition under §1651, Petitioner has emphasized the procedural aspects of what transpired in the District Court. This could be taken as a *sub silentio* admission that substantively the Government's position was correct. No such admission is intended. The problem with any attempt to discuss the "substantive" aspects of the Government's case is that Petitioner knows virtually nothing about them. For one to proclaim his innocence when he has no idea of the conduct with which he is charged is fatuous. Petitioner could hardly dispute that he is the

target of a Grand Jury investigation, nor can he agree that he is.

It "is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976). Petitioner has not forgotten. In asking this Court to review the judgments of the Court of Appeald dismissing his appeal and denying his §1651 petition, Petitioner recognizes that reversal of the former judgment will make the latter judgment moot. If the order of disqualification is held nonappealable, Petitioner has suffered, contrary to the intimation of the Court of Appeals, a grievous wrong at the hands of both Respondents, for which he has no effective remedy, see

In Re Oswalt, 607 F.2d 645, 648 (5th Cir. 1979), and this case ought to be within that narrow band of cases in which the refusal of relief by mandamus is erroneous in law. *Cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 509, 511 (1959).

CONCLUSION

For the reasons given a writ of certiorari should issue to review the judgments dismissing Petitioner's appeal and denying his petition for extraordinary relief.

By Petitioner's Attorney

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Appendix.

United States Court of Appeals for the First Circuit

No. 83-1045.

IN RE GRAND JURY PROCEEDINGS,

WILLIAM J. CINTOLO,
APPELLANT.

BEFORE COFFIN, *Chief Judge*,
BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT

Entered January 26, 1983

In accordance with our order denying appellant's petition for writ of mandamus, stay, writ of prohibition, and injunction, the appeal is dismissed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Berman and Ms. Collins]

United States Court of Appeals for the First Circuit

No. 83-1050. ORIG.

IN RE
WILLIAM J. CINTOLO,
PETITIONER.

BEFORE COFFIN, *Chief Judge*,
BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT

Entered January 26, 1983

There being no right to appeal pre-indictment disqualification of an attorney, *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978), and there being no patent abuse of discretion or new and important issues regarding the power of the district court or other extraordinary circumstances warranting a writ of mandamus, see e.g. *In re Oberkoetter*, 612 F.2d 15, 17 (1st Cir. 1980), the petition for writ of mandamus, stay, writ of prohibition, and injunction is denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

(Cert. c. Hon. Andrew A. Caffrey, Clerk, U.S.D.C., Mass.;
cc: Messr. Berman and Ms. Collins.)

No. 82-1383

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM J. CINTOLO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction under 28 U.S.C. 1291 over an appeal by petitioner, an attorney, from an order disqualifying him from representing any witnesses in connection with a grand jury investigation of which petitioner himself is a target.

2. Whether the court of appeals properly denied petitioner's request under 28 U.S.C. 1651 for extraordinary relief from the disqualification order.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment orders of the court of appeals (Pet. App. 1a, 2a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1983 (Pet. App. 1a, 2a). The petition for a writ of certiorari was filed on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On January 18, 1983, the United States filed a motion in the United States District Court for the District of Massachusetts for an order disqualifying petitioner, an attorney, from representing any witnesses before a grand jury that was investigating petitioner and others for possible violations of 18 U.S.C. (Supp. V) 1503 (obstruction of justice), 18 U.S.C. 1962 (RICO), and other federal statutes.

The motion to disqualify recited that the government had informed petitioner on or before September 10, 1982, that he was among the targets of the grand jury investigation. On November 5, 1982, after petitioner had represented one witness before the grand jury, counsel for the government informed petitioner that, in government counsel's view, petitioner had a clear conflict of interest in representing any additional grand jury witnesses and that the government would seek a disqualification order unless petitioner voluntarily refrained from such representation. In December 1982, witnesses Daw and Orlandella were subpoenaed to testify before the grand jury on January 27, 1983,[1] and petitioner informed counsel for the government that he intended to represent them. The government's disqualification motion further stated that petitioner was counsel for at least one other grand jury target, Gennaro Angiulo, and that witnesses were subpoenaed to provide evidence against Angiulo (Motion to Disqualify at 1-3).[2]

Based on these facts and additional facts contained in an *in camera* affidavit of government counsel detailing the evidence against petitioner and Angiulo,[3] the government asserted that petitioner should be disqualified for two principal reasons: (i) because, as a target of the investigation, petitioner had a personal interest in the matters under investigation that conflicted with the interests of the witnesses

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[1]The scheduled appearance date for witnesses Daw and Orlandella subsequently was postponed until February 3, 1983, to furnish them an opportunity to obtain other counsel.

[2]Copies of the government's motion to disqualify and other materials were filed with the Court by petitioner in connection with his application for a stay (No. A-660), which was denied by Justice Brennan on February 2, 1983.

[3]The Government's Motion for Leave to File Affidavit for In Camera Review explained that the evidence in the *in camera* affidavit was before the grand jury and constituted grand jury material that should not be disclosed publicly. *Id.* at 1, citing Fed. R. Crim. P. 6(e).

subpoenaed to testify about those matters; and (ii) because the interests of Angiulo and those of the other witnesses subpoenaed to testify against Angiulo were in direct conflict. The government contended that in light of petitioner's status as a target of a grand jury investigation into possible obstruction of justice through interference with grand jury witnesses and his representation of another target of that investigation (Angiulo), petitioner's representation of witnesses subpoenaed to testify in these matters might frustrate the public interest in an effective grand jury investigation (Motion to Disqualify at 2-3). The district court, after reviewing the materials and the *in camera* affidavit,[4] granted the motion to disqualify.

Petitioner appealed the disqualification order, but the court of appeals dismissed his appeal, holding that it did not have jurisdiction under 28 U.S.C. 1291 over an appeal from a pre-indictment order disqualifying an attorney. The court of appeals also denied petitioner's petition for a writ of mandamus or prohibition seeking to have the disqualification order set aside, concluding that the district court had not abused its discretion in disqualifying petitioner (Pet. App. 2a).

ARGUMENT

1. It must be beyond serious dispute that the district court acted properly in ordering the disqualification of petitioner from representing witnesses in connection with a grand jury investigation in which petitioner himself is a target. The personal interests of the attorney and those of

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[4]We lodged a copy of the *in camera* affidavit with the Clerk of this Court, under seal, in connection with the stay application mentioned in note 2, *supra*.

his witness/clients inherently conflict in such a case.[5] Petitioner contends (Pet. 11-22), however, that the court of appeals erred in dismissing his appeal from the disqualification order. This contention does not warrant review, especially in the circumstances of this case.

a. As an initial matter, we note that this is not a case in which the witness himself has taken an appeal to challenge the district court's order disqualifying his attorney. Petitioner sought review of the district court's order solely in his own name. Neither of the two witnesses subpoenaed to testify before the grand jury on February 3, 1983 or any other person whom petitioner is barred from representing is named as a party to the appeal. This is more than a matter of form.

If the witnesses had discharged petitioner of their own volition, petitioner would have been required to abide by that decision and would not be entitled to seek a court order reinstating him to his position as counsel for the witnesses. A court could not in this fashion force an attorney on a client who did not wish to have him. Cf. *Faretta* v. *California*, 422 U.S. 806, 820-821 (1975).[6]

Similarly, the client is sufficiently the master of his own case and his relationship with his attorney (see ABA *Code of Professional Responsibility* DR 2-110(B)(4), DR 7-101

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[5]ABA *Code of Professional Responsibility* DR 5-101(A) (1978); *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir.), cert. denied, 449 U.S. 961 (1980); *In re Investigation Before February 1977, Lynchburg Grand Jury*, 563 F.2d 652, 656-657 (4th Cir. 1977); *United States* v. *Hobson*, 672 F.2d 825, 829 (11th Cir. 1982), cert. denied, No. 82-57 (Oct. 12, 1982).

[6]Cf. DR 2-110(B)(4) of the ABA *Code of Professional Responsibility*, which requires an attorney to withdraw from employment (with permission of the court if its rules so require) when he has been discharged by his client.

(1978)) that he may choose to acquiesce in or decline to seek appellate review of a judicial order requiring disqualification of his attorney or may elect to challenge that order by some other means, even if the attorney disagrees with his decision. In such a situation, we submit that the attorney could not countermand his client's wishes and invoke the judicial process in an effort to restore the attorney-client relationship. Thus, in the present case, it was the witnesses, not petitioner, who were the proper parties to seek appellate review of the district court's order disqualifying petitioner. Only if the clients themselves appeal can the appellate court be assured that a decision is sought at the behest of those whom the ethical rules are designed to protect, and not on the basis of pecuniary or other interests of the attorney (or those employing the attorney) that perhaps diverge from those of the client.Cf. *Wood* v. *Georgia*, 450 U.S. 261 (1981).

In this connection, we have been informed by the Special Attorney for the United States responsible for the case that Daw and Orlandella, the subpoenaed witnesses petitioner planned to represent, retained other counsel to represent them before the grand jury. Then, on February 3, 1983, the rescheduled date of their appearance before the grand jury, Daw and Orlandella filed in the district court motions to quash the subpoenaes and for other relief, and the government filed a motion to compel their testimony. The district court granted the government's motion and ordered the two witnesses to appear and testify on February 17, 1983. On February 15, 1983, Daw and Orlandella filed their own petition for writ of mandamus and prohibition in the court of appeals challenging, *inter alia*, the order disqualifying Cintolo. The court of appeals denied this extraordinary relief by memorandum and order dated March 2, 1983 (App., *infra*, 1a-3a). As of the date of this filing, Daw and Orlandella have not sought further review of the court of appeals' decision.

The court of appeals had held in *In re Benjamin*, 582 F.2d 121 (lst Cir. 1978), that a grand jury witness may challenge a disqualification order by refusing to testify and then challenging the disqualification order on appeal from a citation for contempt. We have been informed by the Special Attorney responsible for the case that Daw, represented by new counsel, did testify before the grand jury on February 17, 1983, and thus did not persist in his claimed right to be represented by petitioner before he would testify. The matter of the disqualification of petitioner as Daw's attorney therefore would appear to be moot. We also have been informed, however, that Orlandella refused to testify on the ground, *inter alia*, that she did not have the assistance of counsel of her choice, since petitioner was disqualified. Contempt proceedings in connection with Orlandella's refusal to testify have not yet been scheduled. If she is held in contempt, under the First Circuit's decision in *In re Benjamin*, she may challenge the disqualification order on an appeal from the order holding her in contempt. There accordingly is no need for this Court to grant certiorari in order to ensure review of the disqualification issue on the merits.

b. Nor does the question of the court of appeals' jurisdiction over the appeal under 28 U.S.C. 1291 warrant review at this time. The decision of the court of appeals in this case is consistent with this Court's decisions in *Cobbledick* v. *United States*, 309 U.S. 323 (1940), and *United States* v. *Ryan*, 402 U.S. 530 (1971), counseling against appellate intervention in grand jury proceedings. As petitioner notes (Pet. 12), there is some division among the circuits regarding the appealability of orders disqualifying counsel in various settings, civil and criminal. However, the Court has granted certiorari in *Flanagan* v. United States, No. 82-374 (Jan. 10, 1983), which raises the question of the appealability of a pretrial order disqualifying counsel in a criminal

case. We do not believe it would be useful for the Court to grant review in another case raising the issue of the appealability of a disqualification order, especially because this case arises in the relatively unique context of an appeal brought only by the lawyer, not his client, and in view of unfolding developments in the district court in this case, explained above (see pages 5-6, *supra*). Cf. *United States* v. *Greger*, 657 F.2d 1109 (9th Cir. 1981), cert. denied, No. 81-1357 (May 2, 1983).[7]

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[7]Of the court of appeals decisions cited by petitioner (Pet. 12), in only one — *In re Investigation Before April 1975 Grand Jury*, 531 F.2d 600, 606 n.10 (D.C. Cir. 1976) — did the attorney appeal a disqualification order. But there the union, whose members the attorney had sought to represent, also appealed, thereby offering some independent assurance in the record of the appeal itself that the clients joined in the appellate challenge.

Petitioner also contends (Pet. 14-16) that the disqualification order was appealable under 28 U.S.C. 1292(a)(1) as an order granting an injunction, even if it was not appealable under 28 U.S.C. 1291 as a "final decision." Petitioner offers no authority for this proposition, and although he made a passing reference to 28 U.S.C. 1292(a)(1) in his mandamus petition in the court of appeals (at 23), that court did not address the applicability of 28 U.S.C. 1292(a)(1). It is significant that the order petitioner characterizes as an "injunction" pertained to the conduct of the proceedings themselves, not independent conduct of the parties. Compare *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). To accept petitioner's argument would allow circumvention of the finality requirement of 28 U.S.C. 1291 for every order in an on-going case that compels or bars certain conduct in connection with the case, such as a discovery order or an order requiring compliance with a subpoena. Compare *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-325. Nor does the disqualification order have the requisite "serious, perhaps irreparable, consequence" for appeal to lie under 28 U.S.C.

2. Petitioner also claims (Pet. 22-34) that the court of appeals erred in denying his request for extraordinary relief under 28 U.S.C. 1651. This claim is without merit. This Court has made clear that a writ should issue under that Section "only in extraordinary circumstances" and only where the party seeking relief can show that his right to issuance of the writ is " 'clear and indisputable.' " See, *e.g.*, *Kerr* v. *United States District Court*, 426 U.S. 394, 403 (1976); *Will* v. *United States*, 389 U.S. 90, 95-98 (1967). Even were this Court now to adopt a far more liberal standard, extraordinary relief would plainly be improper here, because, as shown above (see pages 3-4, *supra*), there can be no doubt that the district court properly disqualified petitioner in the circumstances of this case.[8]

Petitioner contends, however, that the procedures by which the disqualification order was issued were improper. These objections are insubstantial. He complains (Pet. 28-31), for example, that he received inadequate notice concerning his possible disqualification. However, the government had notified petitioner in September 1982 that he was a target of the investigation, and in November 1982, after petitioner had represented one witness before the grand

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1292(a)(1) (*Carson* v. *American Brands, Inc.*, *supra*, 450 U.S. at 84, quoting *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955)), because the clients may challenge the disqualification order under *In re Benjamin* through contempt proceedings, in the same manner as other orders that might have a coercive effect.

[8]Nor is there any merit to petitioner's contention (Pet. 22-23) that the decision here is inconsistent with *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), where the court held that the disqualification order was premature because the conflict of interest had not yet ripened. *Taylor* did not involve a conflict between the personal interests of the lawyer and those of his clients, but only potential conflicts of interest among various of the lawyer's clients. In this case, the conflict between petitioner and the witnesses clearly was ripe prior to their actual appearance before the grand jury.

jury, counsel for the government informed petitioner that in government counsel's view, petitioner had a clear conflict of interest and the government would move for his disqualification if necessary. Accordingly, petitioner received ample notice of his possible disqualification.

Petitioner also argues (Pet. 23-24) that the disqualification order was barred by res judicata because another judge of the district court had denied a similar disqualification motion. But as the government explained in the court of appeals, the earlier motion had sought to disqualify petitioner from representing another witness in connection with his release from custody, a matter that Judge Garrity had decided was too remote from the grand jury proceedings to warrant disqualification. See Opposition to Motion for Stay Pending Appeal at 3-4. Here, the disqualification order related to the heart of the grand jury's concerns.[9]

Finally, contrary to petitioner's suggestion (Pet. 25-29), there was nothing improper in the district court's review of the government's motion and *in camera* affidavit prior to the hearing on the motion. This, we presume, would be standard procedure, as part of the court's preparation for the hearing. The fact that the court, on the basis of that review, found disqualification to be clearly appropriate because of petitioner's status as a target likewise is neither surprising nor improper. Petitioner objects to the government's submission of an *in camera* affidavit, but that

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[9]The disqualification motions were assigned to the district court judge in charge of emergency matters at the time the action was filed. This responsibility was rotated from month to month among the district court judges. Consequently, the two disqualification motions, filed at different times, were handled by different judges. This procedure was completely proper. Moreover, contrary to petitioner's contention (Pet. 24-25), even if the assignment of the action did not fully comply with the district court's own rules, this would hardly form the basis for the extraordinary relief of mandamus. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979).

affidavit merely explained the factual background — drawn from grand jury material — for the government's representation to the court that petitioner is a target of the investigation. It was that target status that furnished the basis for the disqualification, not the supporting documentation. In our view, the court could have ordered disqualification on the basis of the government's representation that petitioner is a target,without review of supporting documentation — at least absent an assertion by petitioner, not made here, that the government's representation of his target status was not bona fide. Cf. *Franks* v. *Delaware*, 438 U.S. 154 (1978). In these circumstances, it plainly was appropriate for the court not to furnish petitioner, as a target of the grand jury investigation, with information relating to that very investigation. To have done otherwise would have afforded petitioner and the other targets whom he represented with an unwarranted means of discovery concerning the grand jury's work. See Fed. R. Crim. P. 6(e). Because petitioner did not challenge his status as a target of the investigation, he was not, in any event, prejudiced by the district court's review of the *in camera* submission substantiating the government's representation to this effect. See App., *infra*, 2a.[10]

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[10]In its March 2, 1983 opinion denying mandamus relief to Daw and Orlandella, the court of appeals observed that in such a "clear cut instance[ ] of conflict," disqualification was appropriate in view of the potential for obstruction of the grand jury proceedings and the interest in avoiding future attacks on the validity of any future indictments, without regard to the contents of the *in camera* submission. Since Daw, Orlandella, and petitioner did not challenge petitioner's target status, the court perceived no way in which Daw and Orlandella were prejudiced by review of that submission (App., *infra*, 2a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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D. LOWELL JENSEN
Assistant Attorney General

CAROLYN L. GAINES
Attorney

MAY 1983

DOJ-1983-05

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 83-1107.

IN RE

STELLA ORLANDELLA AND
HAROLD DAW,

Petitioner.

BEFORE COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges*.

MEMORANDUM AND ORDER

Entered March 2, 1983

We find no patent abuse of discretion or other extraordinary circumstances warranting a writ of mandamus to review two district court orders normally reviewable only through contempt proceedings. *In re Oberkoetter*, 612 F.2d 15, 17 (1st Cir. 1978); *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978). First, the district court did not lack jurisdiction, as petitioners contend, to disqualify Mr. Cintolo from serving as their counsel during questioning by the grand jury. Unlike the situation in *In re Taylor*, 567 F.2d 1183, 1187 (2d Cir. 1977), where an attorney representing various witnesses was disqualified before the district court knew whether there would be an actual conflict of interest, here there is no dispute as to the fact that Mr. Cintolo is a target of the grand jury investigation, which by itself puts his

interests in conflict with those of his clients. Thus, the controversy in this case was ripe for judicial adjudication. As to petitioners' claims of lack of notice and of lack of an adequate hearing, we find these to be without merit. Notification through their attorney, then Mr. Cintolo, of the government's request to have him disqualified as their counsel was sufficient notification, and as our records reveal that Mr. Cintolo was made aware of the government's petition, there is no basis for his client's assertion of lack of notice[.] *Link* v. *Wabash R. Co.*, 370 U.S. 626, reh. den. 371 U.S. 873 (1962). Regardless of the propriety, or lack thereof, of the *in camera* review of grand jury materials, as to which we do not express an opinion, we note that the potential for obstruction of the grand jury proceedings coupled with the interest in avoiding future attacks on the validity of grand jury indictments, *see United States* v. *Canessa*, 644 F.2d 61 (1st Cir. 1981), would by themselves justify a disqualification order in such clear cut instances of conflict. Since neither petitioners nor Mr. Cintolo dispute the fact that he was a target of the grand jury investigation, we do not see how they were prejudiced by the *in camera* review of the documents, and consequently, petitioners' lack of hearing claim must fall too.

Petitioners next contend that they have a right to insist on counsel of their own choosing even if there is a conflict, so long as the conflict is explained to them. However, the case law cited for this position is not supportive of it. In *In re Investigation Before Feb. 1977, Lynchberg*, 563 F.2d 652 (4th Cir. 1977), which involved a factual setting strikingly similar to the present one (attorney was target of grand jury investigation), the Fourth Circuit specifically left open the question of informed waiver. "We do not reach the further question of whether the waivers, if executed by witnesses who previously had full knowledge of all of the facts and

legal consequences, might be effective to permit the continued employment of the lawyers", 563 F.2d at 658. Similarly, *In re Taylor* did not address the question of waiver directly, and *United States* v. *Curcio*, 694 F.2d 14 (2d Cir. 1982) dealt with waiver of right to single representation in a criminal trial, not with waiver in the context of a grand jury investigation where the protection of other interests may well warrant a different approach.

The district court's order to compel does not, as petitioners argue, violate their rights under the Fifth Amendment. Nothing in it compels them to testify as to matters that may incriminate them. Their rights under the Fifth Amendment remain and may be exercised.

None of the other arguments raised by petitioners convince us of the necessity or of the wisdom of intervening with the proceedings below at this stage. See *In re Lopreato*, 511 F.2d 1150, 1152 (1st Cir. 1975).

The petition for writ of mandamus, writ of prohibition and injunctive relief is denied.

By the Court:

/s/ DANA H. GALLUP

Clerk.

No. 82-1383.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

WILLIAM J. CINTOLO,
PETITIONER,

v.

UNITED STATES OF AMERICA AND
THE HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply to United States' Brief in Opposition.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-1383

WILLIAM J. CINTOLO,
Petitioner,

V.

UNITED STATES OF AMERICA
HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS
Respondents

REPLY TO POINTS ORIGINALLY RAISED IN BRIEF FOR THE UNITED STATES IN OPPOSITION

Pursuant to Rule 22.5 of the Rules of this Court, Petitioner replies as follows to points first raised in the Government's Brief in Opposition.

1. The Government argues (Bf. 4-7) that the cases cited by Petitioner (Pet. 12) in which courts of appeals have held that disqualification of counsel does not result in an appealable order are distinguishable

in that in none save *In re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600, (D.C. Cir. 1976), did the attorney rather than the client appeal the disqualification order. Perhaps recognizing the "so what?" that such an argument might provoke, the Government proceeds to argue that since the clients could have discharged their counsel, who presumably would have no judicial recourse in the event of such a discharge, counsel should have no right of review when he is disqualified by the District Court. The argument is shockingly inept. It is tantamount to arguing that one whose house is destroyed by fire should have no recourse against an insurer who refuses to pay on the loss since, if he had had no insurance, he would have had to bear the loss himself anyway. That the decision of a client to discharge counsel may be unreviewable is no reason

for the decision of a court to be unreviewable.

There are yet three other defects in the Government's argument. The first is that the Court of Appeals plainly did not base its decision on the distinction suggested by the Government and, what is more, when the clients themselves *appealed*, and *sought extraordinary relief* with respect to, the orders disqualifying their counsel,[1/] the Court adhered to the position that the orders of disqualification were not appealable. Brief in Opposition, p. 1a. The second is that by appealing the order of disqualification and seeking extraordinary

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1/ The suggestion at p. 5 of the Brief in Opposition that the clients, Daw and Orlandella, only sought extraordinary relief, is untrue. The time for them to petition for review by certiorari has not expired, and it is entirely possible that they will yet seek review by certiorari.

relief in the Court of Appeals, the clients *have* manifested a desire to continue to be represented by Petitioner whether or not he is the "target" of an ongoing grand jury investigation. The third is that a conflict between a holding of the First Circuit and a holding of the District of Columbia Circuit is still a conflict between the circuits under Rule 17.1(a).

2. The Government suggests (Bf. 6-7) that in the case of *Flanagan v. U.S.*, 82-374, this court has before it a case dealing with the appealability of a pre-trial order disqualifying counsel in a criminal case and the present case is simply another case raising the same issue. In fact, however, *United States v. Flanagan*, 679 F.2d 1072, 1073, fn 1, (3rd Cir. 1982) plainly holds that such orders are appealable. There is no indication that the Government has

sought certiorari to review this holding. According to 51 L.W. 3496, the issues in *Flanagan* on certiorari are:

> (1) Is court of appeals' decision denying defendants counsel of their choice to present common defense, despite valid waiver of potential conflicts of interest, inconsistent with decisions of Supreme Court and every other circuit that has addressed issue?
>
> (2) Does Fed.R.Crim.P. 44(c) permit court to undercut defendants' constitutionally protected choice of retained counsel?
>
> (3) Does opinion of court below preclude presentation of common defense, regardless of number or affiliation of counsel?
>
> (4) Does opinion undermine ability of clients to consult with and retain counsel of their choice?
>
> (5) Will resolution of these issues diminish substantially workload of federal courts?

Since the Government concedes that there is a conflict among the circuits on the issue

of appealability of disqualification orders and can point to no case before this court in which the issue of appealability has been raised, there is good reason for certiorari to be granted.

3. The Government argues (Bf. 3-4) the merits of the case that the Court of Appeals declined to review, taking the position that witnesses may never be counselled by one who is the target of a grand jury (Bf. 3-4) and that even the Government's unsupported representation that one is a target is enough to warrant disqualification[2/] (Bf. 10). Apparently the Government takes the posi-

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2/ Apparently taking a page from Heller's *Catch-22*, the Government argues that if the representation that Petitioner is a target is made in bad faith, he would have a right to show the contrary, but since grand jury proceeding must remain secret, he should never have the opportunity to show that the representation was made in bad faith (Bf. 10).

tion that no amount of disclosure would cure the conflict. Petitioner will not repeat the arguments made at pp. 32-33 of the Petition. It is enough to point out for the present that if and when the Court of Appeals holds what the Government thinks it should hold, it will be time enough to determine whether its holding can be squared with the holding of the Second Circuit in *United States v. Curcio*, 694 F. 2d 14 (1982), and the holding of this Court in *Holloway v. Arkansas*, 435 U.S. 475, 482-483 (1978) and *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is a matter of curiosity why the Government should again argue the correctness of the judgment of the Court of Appeals on a point that the Court itself has sedulously refrained from deciding, see p. 3a of the Brief in Opposition, and why, if convinced that it

would prevail on the merits, it seeks so loudly and strongly to dissuade this Court from deciding whether the merits should have been reached.

CONCLUSION

The petition for writ of certiorari should be granted.

By Petitioner's Attorney,

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No. 82-1383.

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Supplementation to Petitioner's Reply to United States' Brief in Opposition.

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MISCELLANEOUS.

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DISTRICT OF MASSACHUSETTS,
Respondents,

SUPPLEMENTATION TO PETITIONER'S REPLY
TO RESPONDENT'S BRIEF IN OPPOSITION

On March 25, 1983 the United States Court of Appeals for the First Circuit decided *United States v. Nightingale*, 703 F.2d 17, the publication of which was in the May 9, 1983 issue of the Federal Reporter 2nd temporary edition, which in turn reached Plaintiff's counsel in the ordinary course of mail delivery on May 16, 1983. The case first came to his atten- at that time.

On page 6 of its brief, Respondent states:

> We also have been informed, however, that Orlandella refused to testify on the ground, *inter alia*, that she did not have the assistance of counsel of her choice, since petitioner was disqualified. Contempt proceedings in connection with Orlandella's refusal to testify have not yet been scheduled. If she is held in contempt, under the First Circuit's decision in *In re Benjamin*, she may challenge the disqualification order on an appeal from the order holding her in contempt. There accordingly is no need for this Court to grant certiorari in order to ensure review of the disqualification issue on the merits.

The holding of *Nightingale*, *supra*, 18-19, that a witness's good faith willingness to testify if the order of the District Court compelling testimony is upheld by the Court of Appeals is no defense to a *criminal* contempt proceeding to punish re-

fusal to obey the District Court's order before the order is upheld, forces every witness who would wish to have appellate review of an order disqualifying his attorney to become a "riverboat" gambler and a rather desperate one at that. What witnesses are likely to play for such stakes, however great this loyalty to retained counsel? Therefore, if the holding of the Court below in the present case that orders of disqualification are unappealable is permitted to stand, it means, effectively, that judicial review of orders of disqualification in the First Circuit is a meaningless concept, whereas in the circuits whose cases are discussed on page 12 of the Petition, it is matter of right.

Such utter inconcistency in application of basic legal principles is repugnant to a *Federal* system of law, see

Schaefer, Reducing Circuit Conflicts, 69ABA Journal 452, 453-455 (April, 1983), and strongly militates in favor of granting the present petition for certiorari.

Respectfully submitted,

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